IN THE

Supreme Court of the United States

October Term, 1977

No. 77-926

GERALDINE G. CANNON,

Petitioner,

v.

THE UNIVERSITY OF CHICAGO and Leon O. Jacobson, Dean, Joseph J. Ceithaml, Dean of Students, and the Admissions Committee, of the Pritzker School of Medicine, and SECRETARY OF HEALTH EDUCATION AND WELFARE, Joseph A. Califano and Region V Director of HEW Office for Civil Rights, Kenneth A. Mines,

Respondents.

GERALDINE G. CANNON,

Petitioner,

v.

NORTHWESTERN UNIVERSITY and James E. Eckenhoff, Dean, Charles A. Berry, Dean for Admissions, and the Admissions Committee, of Northwestern Medical School, and SECRETARY OF HEALTH EDUCATION AND WELFARE, Joseph A. Califano and Region V Director of HEW Office for Civil Rights, Kenneth A. Mines,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Geraldine G. Cannon, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in the above cases.

* Pursuant to Rule 48(3) of this Court, Joseph A. Califano has been substituted for F. David Mathews as Secretary of Health Education and Welfare.

OPINIONS BELOW

The opinion of the court of appeals is reported at 559 F.2d 1063, 45 U.S. Law Week 2149. The opinion on rehearing appears at 559 F.2d 1077, 46 U.S. Law Week 2118. Both are set out in the Appendix. (pp. A-2, A-22).

The memorandum of decision in the district court was reported at 406 F. Supp. 1257.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1976. The opinion on rehearing of the Title IX issue presented for review in this Court was filed on August 9, 1977. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on October 3, 1977 with Chief Judge Fairchild and Judge Swygert voting to rehear the Title IX issue *en banc*. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether section 901 of Title IX, Public Law 92-318, 20 U.S.C. §1681, which prohibits discrimination on the basis of sex in education programs receiving federal financial assistance, is enforceable in a federal civil action by an individual.

STATUTE AND REGULATION INVOLVED

Section 901, Title IX, Public Law 92-318, 20 U.S.C. §1681:

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance except that:
>
> (1) in regard to admissions to educational institutions, this section shall apply only to institutions of . . . professional education, and graduate higher education, and to public institutions of undergraduate higher education . . . ."

Section 21(b)(2), Title IX Regulations, 45 C.F.R. §86.21(b)(2):

> "A recipient [of Federal financial assistance] shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable."

STATEMENT OF THE CASE

Petitioner applied for admission to the 1975 entering class at each respondent medical school. She is an experienced surgical nurse over 30 years of age who was then completing her baccalaureate degree *cum laude*. Her academic qualifications, including college grade point average and medical college admission test scores, were higher than a substantial portion of the students subsequently admitted by each school.

After denial of her applications, petitioner filed administrative complaints with the Department of Health, Education and Welfare alleging that each school discriminated against women and that her application was denied at the initial screening level under a published admission policy of each school discouraging applicants over 30 years of age which had a disproportionately adverse effect upon women and did not validly predict success in medical school or practice. Administrative action proved to be unavailable in fact.

In the summer of 1975, petitioner commenced these civil actions. She claimed that the composition of the student body at each school reflected discrimination against women generally and requested a declaratory judgment that the particular policy under which her application was denied by each school discriminated on the basis of sex in violation of Title IX and the HEW regulations thereunder. Reevaluation of her applications without regard to said policies and other remedies also were demanded. Alternatively, she sought to compel administrative action by HEW or to have HEW aligned as party plaintiff in her claim, as a third party beneficiary, to enforce contractual assurances against sex discrimination given by each school to HEW in order to obtain federal financial assistance.

The basis for jurisdiction in the district court was that petitioner's claims are based upon federal civil rights law and

that the United States is a party. Although each respondent school acknowledged receipt of federal financial assistance and its obligation not to discriminate on the basis of sex, the complaints were dismissed for failure to state a claim upon which relief could be granted because Title IX does not authorize a private right of action. The cases were consolidated for briefing and argument on appeal. The court of appeals affirmed, holding that Title IX does not permit a private action by an individual. On rehearing, the federal respondents reversed the position previously asserted and supported petitioner's claim that a private right of action should be implied under Title IX.

REASONS FOR GRANTING THE WRIT

1. The court of appeals has decided an important question of women's rights under federal law which has not been, but should be, settled by this Court.

The question of private enforceability of section 901 of Title IX should be settled by this Court, particularly where such question also relates directly to the enforceability of two other federal laws which are worded identically, namely section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which prohibits discrimination on the ground of race, color or national origin in any program receiving federal financial assistance, and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, which prohibits discrimination solely by reason of a handicap in such programs. Title IX was patterned on Title VI and section 504 in turn was patterned on Title VI and Title IX. These laws differ only in the types of discrimination and programs covered by each.

The importance of the national effort to promote equal opportunities for all persons is clear. The importance of

equal access to education in that effort has been abundantly established. This case presents to the Court, as a matter of first impression, the question of whether the primary federal statute prohibiting sex discrimination in education programs receiving federal financial assistance may be enforced by private parties in the federal courts, at least where the administrative enforcement capability of HEW is inadequate or unavailable.

One reflection of the importance of the court of appeals decision is the parties who supported petitioner. On rehearing, HEW's national Office for Civil Rights and the civil rights division of the Department of Justice reversed the position which had been asserted on behalf of the federal respondents by regional officials and supported petitioner's claim that, in the circumstances of this case, a private right of action should be implied under Title IX. Supporting briefs were submitted as *amici curiae* by Senator Birch E. Bayh, Jr., one of the principal congressional sponsors of Title IX; by the Women's Rights Project of the American Civil Liberties Union and the NOW Legal Defense and Education Fund; and by the National Education Association, the Women's Equity Action League and the National Organization for Women.

Appropriately, the principle embodied in the published policies of the respondent schools here at issue is at the heart of the national effort to eliminate unreasonable sex discrimination. Exclusionary policies which utilize gender or race as express terms have been generally eliminated through federal civil rights enforcement efforts under Title IX and Title VI, respectively. When the relative academic and career patterns of men and women are examined it becomes clear that the respondent schools' admission policies could not be more calculatedly aimed at excluding women without using gender as an express term. Virtually all medical schools have comparable policies as do many other graduate

and professional schools.[1] The effect of such continued sex discrimination by medical schools has been devastating in that now, almost seven years after explicit congressional prohibition of sex discrimination in admissions to medical schools,[2] even though almost 50% of college graduates and about 85% of the personnel in the health care field are women,[3] only about 20% of entering medical students are women.

In her Epilogue to the Tenth Anniversary Edition of "the book that started it all," THE FEMININE MYSTIQUE, (W.W. Norton & Co., New York, 1963, 1974) Betty Friedan reported that application of a similar "age" policy by the department of Psychology at Columbia University was the incident which sparked formation of the National Organization for Women. Sociological and statistical support for the significance and importance of petitioner's claim has been well documented. See *e.g.* WALSH, DOCTORS WANTED, NO

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[1] According to data published by the Association of American Medical Colleges applicants to U.S. medical schools adversely affected by policies discriminating against persons over a specified age, ranging generally from 27 to 30, numbered about 4,000 in 1974 alone. To this must be added otherwise qualified potential applicants who were deterred by the chilling effect of such published policies. Petitioner alleged that such persons are disproportionately female and proferred statistical data to support that claim. The basic explanation is simple. Many women interrupt their education to marry and raise children before completing graduate or professional education. For example, the percentage of students for whom the lapse of time from receipt of a baccalaureate degree to the commencement of graduate study is 10 years or more is 2½ times as great for women as for men. Marriage and children are the reasons most often cited by women for the interruption of education but rarely cited by men.

[2] Section 799A, Public Health Service Act, 42 U.S.C. § 295h-9. Title IX was enacted the following year.

[3] Shelton & Bernett, Sex Discrimination in Vocational Education: Title IX and Other Remedies, 62 *Calif. L. Rev.* 1121 (1974).

WOMEN NEED APPLY, (Yale Univ. Press 1977); HARRIS, THE PRIME OF MS. AMERICA, (G. P. Putnam's Sons, New York, 1975); and ASTIN, THE WOMAN DOCTORATE IN AMERICA, (Russell Sage Foundation, New York 1969).

Following the original decision in the court of appeals, Congress adopted the Civil Rights Attorney's Fees Awards Act of 1976, Public Law 94-559, 42 U.S.C.A. § 1988 (1977 Supp.) which authorizes the award of attorney's fees in any action to enforce specified civil rights laws, including Title VI and Title IX. Virtually every congressman who spoke on the attorney's fees act strongly reflected the understanding that Title VI and Title IX were enforceable in private actions.[4] That Act confirmed the earlier congressional declaration that Title VI and Title IX "permit a judicial remedy through a private action," made in connection with amendment of the Rehabilitation Act of 1973. 1974 U.S. Code Cong. and Adm. News 6390-91. Such congressional declaration of the

[4] See: 122 Cong. Rec. (daily ed. Sept. 21, 1976) S.16251 report of Sen. H. Scott and S.16252 report of Sen. Kennedy and (daily ed. Oct. 1, 1976) report of Rep. Drinan. See also: 122 Cong. Rec. (daily ed. Sept. 21, 1976) S.16262 remarks of Sen. Allen, (daily ed. Sept. 22, 1976) S.16431 remarks of Sen. Hathaway, (daily ed. Sept. 29, 1976) S.17051 remarks of Sen. Tunney, S.17052 remarks of Sen. Abourezk, (daily ed. Oct. 1, 1976) H.12152 *et seq.* colloquy among Reps. Quie, Drinan, Anderson and Bauman, H.12161 remarks of Rep. Railsback, H.12165 remarks of Rep. Sieberling and H.12164 remarks of Rep. Holzman.

The opinion on rehearing concluded that Title IX was specified in the act "merely to provide for the possibility that some court might deem it appropriate in the future to imply a private right of action from the provisions of Title IX." 559 F.2d at 1080 (App. p.A-27) However, that construction presumes inclusion of Title VI and Title IX in the act either invited judicial interpretation contrary to the intent of Congress or is a nullity. At the very least the attorney's fees act demonstrates that a private right of action under Title VI or Title IX would not conflict with congressional intent. Such asserted conflict, however, was the basis for the denial of such a right of action in the decision below.

enforceability of Title VI and Title IX followed this court's statement of the enforceability of Title VI in *Lau* v. *Nichols*, 414 U.S. 563, 566 (1974). That Congress intended Title IX to be enforceable in the same manner as Title VI is clear beyond question.

The Senate Report on the attorney's fees act stated, "These fee shifting provisions have been successful in enabling vigorous enforcement of modern civil rights legislation while at the same time limiting the growth of the enforcement bureaucracy." 1976 U.S. Code Cong. and Adm. News 5911. This matter provides an apt illustration. On June 2, 1976, 15 months after filing, the regional office of HEW advised petitioner that her claims present issues "of first impression and national in scope." (App. p. A-35). She has received no further communication on her administrative complaints. While HEW has recognized a responsibility to investigate individual complaints, it is not capable of fully processing each individual complaint with its available staff and funding.[5]

The Title IX regulations, like the Title VI regulations, permit participation by an individual complainant at the discretion of HEW but they do not afford the individual any right to participate. Termination of federal assistance, without more, provides punishment of an offending recipient instead of a remedy to an aggrieved individual. Specific enforcement of contractual assurances against discrimination is a far more appropriate remedy for valid individual complaints. The position of HEW on rehearing, supporting a

[5] See *Rosado* v. *Wyman*, 397 U.S. 397 (1970), *Allen* v. *Board of Education*, 393 U.S. 544, 556 (1969). HEW Secretary Mathews confirmed that "current and projected staff resources will still be inadequate simultaneously to eliminate the complaint backlog, to resolve all incoming complaints on a timely basis, and to fulfill other essential enforcement responsibilities." 41 Fed. Reg. 18394 (1976).

private right of action under Title IX, accords with the long-standing opinion of departmental counsel dated September 17, 1974, a copy of which is set out in the Appendix. (p. A-36).

2. The decision below conflicts with applicable decisions of this Court pertaining to discrimination on the basis of race, color or national origin, and related issues.

This Court should grant certiorari to correct the conflict between the decision below and three decisions of this Court.

First, in *Lau* v. *Nichols*, 414 U.S. 563 (1974), this Court recognized the enforceability of Title VI as follows:

> "We do not reach the Equal Protection Clause argument which has been advanced but rely solely on § 601 [of Title VI] to reverse the Court of Appeals." 414 U.S. at 566.

The decision below distinguished *Lau* with the unprecedented ruling that federal courts may imply jurisdiction under Title VI or Title IX for actions by "large groups" claiming race or sex based discrimination but not for individual actions.[6] Such distinction however, fails to recognize that a suit for violation of Title VI or Title IX is necessarily in the nature of a class action because the evil sought to be ended is discrimination on the basis of a class characteristic, *i.e.* race, color, national origin or sex, and overlooks the central role of *stare decisis* in our legal system. By so limiting access to the courts, it runs contrary to American tradition that civil rights are basically individual rights.

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[6] 559 F.2d at 1072, 1074 n. 16, 1083. (App. pp. A-12, A-16 n. 16, A-33).

Recently, in *Regents of the University of California* v. *Bakke*, No. 76-811, this Court *sua sponte* requested supplemental briefs as to the applicability of Title VI to that case. Such action would have little meaning in that suit by an individual if the decision below had correctly distinguished *Lau* as being dependent upon the large number of plaintiffs. Such action by this Court on its own initiative also rejects the alternative distinction asserted in the decision below that *Lau* and other decisions of lower federal courts which involved both constitutional and statutory claims under Title VI, were decided under the Constitution. Exactly the opposite conclusion, namely that such cases were decided under the statute, accords with such action by this Court in *Bakke* and the well established policy of deciding cases on non-constitutional grounds if possible.

Second, the decision below conflicts with the decision of this Court in *Cort* v. *Ash*, 422 U.S. 66 (1974). That decision articulated four factors pertinent to implying a private cause of action under a federal statute which does not expressly provide such a remedy.

With respect to the most pertinent factor of whether there is an indication of legislative intent to permit or deny such a remedy, *Cort* stated that where federal law has granted a class of persons certain rights, — as do both Title VI and Title IX, by utilizing the language, "No person in the United States shall . . . be deprived of the benefits" — it is not necessary to create a private cause of action although an explicit purpose to deny such a cause of action would be controlling. 422 U.S. at 82. Clearly, no purpose to deny a cause of action is evident in either Title VI or Title IX. Any such purpose would preclude the courts from deciding cases under Title VI or Title IX where federal jurisdiction had been claimed on some other basis such as "state action" under 42 U.S.C. § 1983, because Congress applied the same

policy in the same words to both state and private recipients of federal financial assistance in both statutes.[7] Yet the court of appeals on rehearing adopted such an alternative distinction for *Lau* and the multitude of other decisions which permitted private actions under Title VI.[8]

The three other factors specified in *Cort* all confirm that a private right of action should be implied: petitioner is within the class for whose *especial* benefit Title IX was enacted; the federal respondents have confirmed that her private action would not conflict with their administrative efforts but instead provide appropriate support; and civil rights have not been traditionally relegated to state law.

Finally, the decision below conflicts with the decision of this court in *Conley* v. *Gibson*, 355 U.S. 41 (1957) that "a complaint should not be dismissed unless it appears beyond

[7] While the decision on rehearing was pending, another panel of the Seventh Circuit in *Lloyd* v. *RTA*, 548 F.2d 1277 (7th Cir. 1977) held that section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, was enforceable against defendants to whom 42 U.S.C. § 1983 did not apply. On rehearing, the court below distinguished *Lloyd* on the ground that Congress provided no remedy at all for section 504, overlooking the finding in *Lloyd* that the legislative history expressly contemplated administrative regulations and enforcement comparable to Title VI and Title IX. Cf. 559 F.2d at 1082 (App. p. A-32) and 548 F.2d at 1281-82 n.15, 1285. The enforcement provisions of the HEW regulations for both Title IX and section 504 are identical. Both simply incorporate by reference the enforcement provisions for Title VI. 45 C.F.R. § 84.61 and 45 C.F.R. § 86.71.

[8] 559 F.2d at 1083 (App. p. A-33-34). See annotations for Title VI, 42 U.S.C.A. § 2000d *et seq.* Analytically, the distinctions of *Lau* on constitutional and state action grounds are the same because 42 U.S.C. § 1983 by its terms requires violation of civil rights afforded by the Constitution and laws of the United States. If judicial enforcement of Title VI or Title IX would conflict with the intent of Congress, such laws could not trigger the operation of section 1983, thus leaving only the constitutional argument. This Court, however, expressly declined to reach the Equal Protection Clause argument in *Lau* and relied solely on section 601.

doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. at 45-46. Specifically, the court of appeals in conflict with *Conley*:

> (i) adopted one respondent school's vague and unproven suggestion that admission of petitioner would require discrimination against better qualified applicants[9] instead of petitioner's verified allegation, based upon data published by the school, that she had higher academic qualifications than a substantial number of its accepted students;[10]
>
> (ii) overlooked petitioner's claim that she is within a large class of women against whom respondents discriminate on the basis of sex;[11]
>
> (iii) rejected petitioner's claim under 42 U.S.C. § 1983 that in order to obtain state assistance[12] both respondent schools preferred Illinois residents contrary to what school administrators would decide on the basis of academic policy on the ground that facts cited by

[9] Such suggestion was made only on behalf of the Univ. of Chicago respondents. The Northwestern respondents had acknowledged in writing that their age policy was involved in denial of petitioner's application.

[10] Petitioner estimated that her grade point average at the time of application and medical college admission test scores were higher than at least 25% of the students accepted by the school and that her final grade point average was higher than at least 50% of the accepted students.

[11] See footnote 1 above.

[12] Petitioner claimed that each medical school is operated predominately from governmental funds. The Pritzker School of Medicine admitted direct state aid amounting to more than $9,600 per Illinois student per year. Tuition and fees were less than $3,300 at that time. Federal financial assistance creating Title IX obligations was acknowledged by both schools but the amount was not disclosed. Federal assistance is subject to state control under the Public Health Service Act. See *Simkins* v. *Moses H. Cone Memorial Hosp.*, 323 F.2d 959, 966-69 (4th Cir. 1963) *cert. denied*, 376 U.S. 938 (1964).

petitioner to evidence such policy "may be" related to other factors[13]; and

(iv) initially held, without explanation, that delay of "about one year" in administrative action by HEW on petitioner's Title IX claim was not unreasonable and, on rehearing, after such delay had exceeded 2½ years and HEW had supported petitioner, claimed that administrative enforcement of Title IX had not been "given an opportunity to work".[14]

Thus, the court of appeals decided the important question of women's rights under federal law presented by this petition in conflict with applicable decisions of this court in *Lau*, *Cort* and *Conley*.

By denying to women seeking enforcement of rights secured by Title IX the same procedure afforded by the decision of this Court in *Lau* for rights secured by Title VI, the decision below rejected the substantial legislative history and obvious identity of language that compel similar interpretation. The distinction of *Lau* on the basis of the number of plaintiffs is unprecendented and contrary to American legal tradition. The alternative distinction on state action

[13] 559 F.2d at 1069n.7. (App. p. A-6n.7). *Cf.* 559 F.2d at 1072n.9, 1083. (App. pp. A-11n.9, A-33-34). Petitioner's §1983 claims included violation of Equal Protection Clause as well as Title IX.

[14] 559 F.2d at 1077, 1082. (App. pp. A-20, A-32). Lack of prompt outside enforcement by HEW and the courts cannot help but tempt recipients to delay the institution of meaningful internal procedures to resolve claims of discrimination thereby increasing the substantial HEW administrative backlog and creating constitutional litigation for the courts on matters which could be resolved under the statute and regulations as in *Lau*. More importantly, neglect of prompt enforcement, for whatever reason, permits continued federal subsidy of discrimination in defiance of national policy.

and constitutional grounds fails to account for Congress' adoption of the same policy for all specified programs receiving federal financial assistance, state or private, and the pointed reliance by this Court in *Lau* on the statute and the regulations instead of the Equal Protection Clause. The importance of the issue under federal law requires that it be settled by this Court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

August 27, 1976

Before

Hon. ROBERT A. SPRECHER, *Circuit Judge*

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. ROBERT A. GRANT, *Senior District Judge**

No. 76-1238
GERALDINE G. CANNON,
Plaintiff-Appellant,
v.
THE UNIVERSITY OF CHICAGO, et al.,
Defendants-Appellees.

No. 76-1239
GERALDINE G. CANNON,
Plaintiff-Appellant,
v.
NORTHWESTERN UNIVERSITY, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

Nos. 75-C-2402, 75-C-2724
JULIUS J. HOFFMAN, Judge

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

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* Honorable Robert A. Grant, Senior Judge, United States District Court for the Northern District of Indiana, sitting by designation.

In the
United States Court of Appeals
For the Seventh Circuit

No. 76-1238

GERALDINE G. CANNON,

Plaintiff-Appellant,

v.

THE UNIVERSITY OF CHICAGO, et al.,

Defendant-Appellees.

No. 76-1239

GERALDINE G. CANNON

Plaintiff-Appellant,

v.

NORTHWESTERN UNIVERSITY, et al.,

Defendant-Appellees.

Consolidated appeals from the United States District Court for the Northern District of Illinois, Eastern Division — Nos. 75 C 2402, 75 C 2724
JULIUS J. HOFFMAN, *Judge.*

HEARD JUNE 4, 1976 — DECIDED AUGUST 27, 1976

Before SPRECHER, BAUER, *Circuit Judges,* and GRANT, *Senior District Judge.**

BAUER, *Circuit Judge.* Plaintiff Geraldine Cannon brought this civil rights suit against defendants, the University of Chicago, Northwestern University, and various individual officers of the schools, after she was rejected as an applicant for admission to the medical schools. She alleges that she was refused on the basis of her age and sex. The trial court dismissed the suit for failing to state a claim upon which relief could be granted. We affirm.

* The Hon. Robert A. Grant, United States District Court for the Northern District of Indiana, is sitting by designation.

Plaintiff at the time of application was 39 years old with a bachelor's degree from Trinity College of Deerfield, Illinois. Her medical college admission test scores placed her in the lower half of the applicant group. Her undergraduate grade point average in basic science was 3.17 on a 4.00 scale.

Although the plaintiff's academic credentials were good, statistics for the 1975 entering class at the University of Chicago Pritzker School of Medicine indicate the plaintiff faced overwhelming competition; 5,427 persons applied for the 104 positions available at the medical school. In sharp contrast to plaintiff's grades, the overall average of the entering class was 3.70. The Dean of the medical school stated in an affidavit that there were at least 2,000 unsuccessful applicants who had better academic qualifications than the plaintiff.

A review of the persons who applied with plaintiff indicates that 1,172 were women and 4,154 were men. Of the 104 admitted, 19 were female and 85 were male. Over the past four years, 18.1% of the applicants to the University of Chicago Medical School has been female; while over the same period 18.3% of the entering class has been female.[1]

Despite the difficult factual setting[2] in which plaintiff

[1] Although the factual analysis and statistics quoted relate only to the University of Chicago Medical School, the admission practices are similar at Northwestern. The plaintiff also brought an administrative complaint against all the other medical schools in the State of Illinois. Each of them also refused her admission.

[2] The factual picture presented by comparing the plaintiff's qualifications against the objective standard set by the statistical record of the entering class indicates that it would have been unfair to admit plaintiff to the class ahead of at least the 2,000 other applicants who had better academic records. Of course we realize that the admission committees base their decisions upon other factors in addition to the applicant's academic record, such as past achievement in employment or extracurricular activities. There is no allegation that plaintiff's past employment or extracurricular activity brought extra attention to her application.

found herself she brought suit alleging age and sex discrimination. The complaint alleged that her rights were violated under the Civil Rights Act of 1871, 42 U.S.C. § 1983, Title IX of the Education Amendments to the Civil Rights Act of 1964, which prohibits sex discrimination, the Age Discrimination in Employment Act, 29 U.S.C. §621, and the Public Health Services Act, 799A, 41 U.S.C. § 295h-9. Plaintiff also filed administrative complaints with the Department of Health, Education and Welfare ("HEW"). Later the complaint was amended naming HEW and its regional director as defendants in the suit.[3] In affirming the dismissal of the complaint we will consider each of plaintiff's jurisdictional claims individually.

I. INSUFFICIENT STATE ACTION EXISTS FOR FEDERAL JURISDICTION UNDER 42 U.S.C. § 1983.

Plaintiff's chief allegation is that the defendant's rejection of her application for admission to medical school deprived her of equal protection of the laws in violation of 42 U.S.C. § 1983.[4] The district court granted defendants' motion to dismiss for lack of subject matter jurisdiction over this claim on the ground that plaintiff had failed to meet the "state action" requirement of § 1983. In so ruling, Judge Hoffman specifically applied the standards for the "state action" requirement which have been articulated in recent years by the United States Supreme Court and by this Court.

[3] Plaintiff filed an administrative sex discrimination complaint with HEW upon receiving notice of her rejection for admission to the medical school at the University of Chicago. Later she also filed complaints against Northwestern, Southern Illinois University Medical School, Stritch School of Medicine at Loyola University, and the University of Illinois Medical School. When informed that the investigation of her complaints would be delayed, plaintiff named the regional director and HEW as party defendants in this suit. Presently HEW is still investigating her claim of discrimination.

[4] 42 U.S.C. §1983 states:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress."

In *Moose Lodge No. 107* v. *Irvis*,[5] 407 U.S. 163, 173 (1972), a black guest was refused service in a private club's dining room because of his race. Since the club was operating pursuant to a liquor license issued by the Pennsylvania Liquor Control Board and was subject to detailed regulations by the Pennsylvania Board, the plaintiff argued that sufficient "state action" was present to establish a violation of his Fourteenth Amendment rights.

The Court rejected the "state action" claim, observing:

> "The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct set forth in the Civil Rights cases, *supra*, and adhered to in subsequent decisions. Our holdings indicate that where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations', *Reitman* v. *Mulkey*, 387 U.S. 369, 380 (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition." 407 U.S. at 173.

The requirement of state action was explained even more fully by the Supreme Court in *Jackson* v. *Metropolitan Edison Comm.*, 419 U.S. 345 (1974). Suit was brought under § 1983 against a private utility company seeking an injunction and damages for the termination of plaintiff's electrical services without notice, a hearing, or an opportunity to pay any amounts due. The claim of state action was based upon the following allegations: (1) the State had conferred monopoly status upon the utility company; (2) the utility performed a public service required to be supplied on a continuous basis under the

[5] Plaintiff seeks to distinguish *Moose Lodge No. 107* v. *Irvis*, *supra*, on the basis that no financial assistance was involved in that case. We note that the use of a liquor license to a private club can be just as important as financial assistance to a private university.

law, hence performing a "public function"; and (3) the state "specifically authorized and approved" the termination practice. In holding that this was insufficient for a finding of state action under § 1983, the Supreme Court outlined the relevant test (419 U.S. at 350-51):

> "The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. * * * Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so. *Public Utilities Comm'n.* v. *Pollak*, 353 U.S. 451, 462 (1952). It may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be "state' acts than will the acts of an entity lacking these characteristics. But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself. *Moose Lodge No. 107*, *supra*, at 176.

The Supreme Court has thus made clear that neither general government involvement nor even extensive detailed state regulation is sufficient for a finding of state action. Rather, the state must affirmatively support and be directly involved in the specific conduct which is being challenged.[6]

Plaintiff in this case makes an allegation that because the medical school receives money from the state its admission decisions are made differently than school administrators would otherwise decide on the basis of academic policy. We see nothing in the record to support this conclusory allegation.[7] Plaintiff argues that the

[6] See, *Washington* v. *Davis*, 44 U.S.L.W. 4789 (decided June 7, 1976).

[7] Plaintiff does make the allegation that both defendants accept a greater proportion of Illinois residents in the entering class than residents from any other state. She claims this fact demonstrates the influence and control the State has over the admission policies of the schools. We believe that plaintiff's conclusion is not justified. The fact that both schools have a higher number of in-state residents may be directly related to the fact that more Illinois residents accept positions in the schools because they are conveniently located to their homes. In

giving of financial assistance by the state is tantamount to direct involvement of the state. See, *Weiss* v. *Syracuse University*, 522 F.2d 397 (2d Cir. 1975); *Grafton* v. *Brooklyn Law School*, 478 F.2d 1137, 1142 (2d Cir. 1973); *Broadsen* v. *University of Pittsburgh*, 477 F.2d 1, 6 (3d Cir. 1973); *Brown* v. *Strickler*, 422 F.2d 1000, 1001 (6th Cir. 1970); *Racklin* v. *University of Pennsylvania*, 386 F.Supp. 992, 1001 (E.D. Pa. 1974); *Issacs* v. *Board of Trustees of Temple University*, 385 F.Supp. 473, 479 (E.D. Pa. 1974). We agree that in some situations state financial assistance can amount to state action. But in this case we do not believe that the character and amount of assistance mandates a finding of state action. As Justice Stevens (then Circuit Judge) stated in *Cohen* v. *I.T.T.*, 524 F.2d 818 at 825 (7th Cir. 1975):

> "Two different conclusions may be drawn from the allegations relating to the State's support of I.T.T. First, it is plain that the school is not so heavily dependent on the State as to be considered the equivalent of a public university for all purposes and in all its activities. It would dramatically enlarge the state action concept to conclude that these facts are sufficient to require a complete surrender of a university's private character. . . ."

A reading of the cases indicates that the concept of state action depends not only upon the amount of state financial assistance but also upon the type of injury alleged. In this case, where there appears to be no state connection to the injury alleged, where there is no indication that the state exercises any control of the medical schools' admissions policies, it would be improper to divest the medical schools of their private character.

[7] (Continued)
addition more Illinois residents probably apply for admission than residents of any other state. Even assuming that the admission policy favored Illinois residents we see no state action unless the schools' decision is directly related to some state control. And, even if the state did require that Illinois residents be favored, such a requirement is generally permissible under the Fourteenth Amendment. It is reasonable and rational that a state institution favor its own taxpayers, or the children of its taxpayers, in selecting an entering class. In any event, plaintiff has no standing to formally raise this claim since, assuming *arguendo* the defendants favor Illinois residents, she stands to benefit from such a policy.

This Court has followed the approach outlined by the Supreme Court in requiring a "nexus" between the state and the challenged conduct in several recent decisions. For example, in *Doe* v. *Bellin Memorial Hospital*, 479 F.2d 756 (7th Cir. 1973), a doctor and a pregnant woman seeking to use a hospital's facilities for the purpose of performing an abortion filed a lawsuit against the hospital and its officials. Jurisdiction was claimed under §1983 based on the fact that the defendant hospital had "accepted financial support . . . from both the federal [Hill-Burton Act] and state governments, . . . [was] subject to detailed regulation by the State" and "had been an agency through which the State of Wisconsin and the United States Government [had] provided medical services for residents of Northeastern Wisconsin. . . ." 479 F.2d at 758, 761.

The Court rejected the claim of §1983 jurisdiction, finding that the "record [did] not reflect any governmental involvement in the very activity . . . being challenged." The Court made clear that the governmental involvement necessary to meet the "state action" requirement under §1983 must be "affirmative support" measured by its direct contribution to the conduct at issue. Such affirmative support was lacking in *Doe*, the Court held, as "there [was] no claim that the state [had] sought to influence hospital policy respecting abortions, either by direct regulation or by discriminatory application of its powers or its benefits." In sum, the Court concluded:

> "The facts that defendants have accepted financial support, as alleged, from both the federal and state governments, and that the hospital is subject to detailed regulations by the state, do not justify the conclusion that its conduct, which is unaffected by such support or regulation, is governed by §1983." (479 F.2d at 761.)

See also *Driscoll* v. *International Union of Operating Engineers, Local 139*, 484 F.2d 682, 690 (7th Cir. 1973), *cert. denied* 415 U.S. 960 (1974): "To be regulable under constitutional standards through §1331 or §1983, the very activity of a private entity which a plaintiff challenges must be supported by state action that significantly

fosters or encourages that activity"; *Lucas* v. *Wisconsin Electric Company*, 466 F.2d 638, 654-56 (7th Cir. 1972) (en banc), *cert. denied* 409 U.S. 1114 (1973); *Bright* v. *Isenbarger*, 445 F.2d 412 (7th Cir. 1971) (per curiam).

Finally, this Court's recent decision in *Cohen* v. *Illinois Institute of Technology, supra*, is fully dispositive of plaintiff's §1983 claim here. There, a female assistant professor brought suit under §1983 against I.I.T. and some of its officers alleging that the university had discriminated against her in appointment, retention, and compensation on account of her sex. The district court dismissed the §1983 claim because I.I.T. is not a state school and plaintiff had not shown state involvement in the personnel practices which she challenged. 384 F.Supp. 202 (N.D. Ill. 1974).

This Court affirmed the dismissal stating:

> "To support the proposition that the defendants acted under color of state law, plaintiff has made detailed allegations which may be considered in four parts: first, by using the word 'Illinois' in its name, I.I.T. has, in effect, held itself out as a state instrumentality; second, I.I.T. has received financial and other support from the state; third, I.I.T. is pervasively regulated by the state; and fourth, it has failed to take affirmative action to prevent I.I.T. from using gender as a criterion for faculty compensation and promotion. The complaint, however, contains no allegation that any State instrumentality has affirmatively supported or expressly approved any discriminatory act or policy, or even had actual knowledge of any such discrimination.
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> [T]here is no allegation in the complaint that the various forms of assistance given to I.I.T., or to its students, by the State, have had any impact whatsoever on the ability of Dr. Cohen, or any other member of her sex, to be treated impartially by the administration of the Institute. The State has lent significant support to I.I.T.; it is not, however, alleged to have lent any support to any act of discrimination [footnotes omitted]." 524 F.2d at 823-826.

Also see, *Greco* v. *Orange Memorial Hospital Corp.*, 513 F.2d 873, 880 (5th Cir. 1975); *Ascherman* v. *Presbyterian Hospital of Pacific Medical Center, Inc.*, 507 F.2d 1103, 1105 (9th Cir. 1974); *Ward* v. *St. Anthony Hospital*, 476 F.2d 671, 674-75 (10th Cir. 1973); *Blackburn* v. *Fisk University*, 443 F.2d 121, 124 (6th Cir. 1971).

In this case all that plaintiff alleges is the receipt of state and federal financial assistance.[9] But, even assuming financial aid and assistance by the state in whatever amounts, such aid and assistance is insufficient for jurisdiction under §1983 unless it can be shown that the state has "affirmatively supported" the particular conduct challenged here.

Plaintiff asserts that her mere allegation of "particularly offensive discrimination in violation of national policy" obviates the requirement that there be a nexus between the state and the challenged activity. We cannot subscribe to such a position. For *Moose Lodge* itself, which articulated the nexus requirement, involved race discrimination which is obviously both offensive and in violation of national policy. And *Cohen* also involved the issue of sex discrimination; yet this Court was clear in its requirement that detailed state regulation is not enough

[9] Plaintiff has also sought to show that the federal financial assistance given to the defendants impliedly grants jurisdiction to the federal courts to consider allegations of discriminatory federal action. To support this Fifth Amendment claim she cites *Green* v. *Kennedy*, 309 F.Supp. 1127 (D.C. Cir. 1970), appeal dismissed *sub nom Cannon* v. *Green*, 398 U.S. 956 (1970); *Green* v. *Connally*, 330 F.Supp. 1150 (D.C. Cir. 1971), aff'd. *sub nom Cait* v. *Green*, 404 U.S. 997 (1971). But those suits were brought against a federal officer to enjoin direct government conduct which conferred tax exempt status upon racially segregated schools. The factual setting of those decisions were far different than the instant case. In this case which is primarily a §1983 suit (the HEW regional director joined as a defendant only because of alleged administrative misfeasance), the fact that there is federal support cannot be used to create §1983 jurisdiction. *Weiss* v. *Syracuse University*, 522 F.2d 397, 404 (2d Cir. 1975); *Greco* v. *Orange Memorial Hospital*, 513 F.2d 873, 876, n. 3 (5th Cir. 1975); *Blackburn* v. *Fisk University*, 443 F.2d 121, 123 (6th Cir. 1971); *Browns* v. *Mitchell*, 409 F.2d 593, 595 (10th Cir. 1969). See *Birens* v. *Six Unknown Named Agents*, 456 F.2d 1339, 1346 (2d Cir. 1972). Furthermore, it should be noted that jurisdiction based on federal action has been interpreted analogously to that of state action. Thus plaintiff must show the same amount of significant involvement of the federal government in the discriminatory conduct that is being alleged. *Junior Chamber of Commerce* v. *United States Jaycees*, 495 F.2d 883 (10th Cir. 1974).

unless the "regulatory agency has encouraged the practice in question, or at least given its affirmative approval to the practice." (524 F.2d at 826.)

II. TITLE IX DOES NOT PROVIDE FOR A PRIVATE RIGHT OF ACTION IN THIS SITUATION.

Title IX of the Education Amendments of 1972, 20 U.S.C. §1681, *et seq.*, prohibits discrimination based on sex in most educational institutions receiving federal financial assistance. Title IX states:

> "No person in the United States shall on the basis of sex, be excluded from participation in, be denied the benefits of or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

Plaintiff maintains that Title IX provides an independent basis of federal jurisdiction for her action. On the other hand, the defendants claim that Title IX does not provide an independent cause of action in federal court, but rather, provides for mandatory administrative procedures followed only then by judicial review.

The question, we believe, is one of first impression.[9] Consequently we must look to the intent of Congress, as well as the experience of the courts in dealing with similar statutes.

Plaintiffs rely heavily upon previous decisions based upon Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, *et seq.*, the language[10] of which is identical to Title

[9] Plaintiff claims that at least three actions have been maintained by private plaintiffs under Title IX, i.e., *Brenden* v. *Independent School Dist.* 742, 477 F.2d 1292 (8th Cir. 1973); *Berkelman* v. *San Francisco Unified School Dist.*, 501 F.2d 1264 (9th Cir. 1974); and *Trent* v. *Perritt*, 391 F.Supp. 171 (D.C. Mass. 1975). Plaintiff's reliance upon these decisions is clearly misplaced. Title IX, while mentioned in the decisions, was not relied upon as establishing jurisdiction. Those cases involved sex discrimination which amounted to a violation of the equal protection clause and there was no serious jurisdictional problem.

[10] Title VI, 42 U.S.C. §2000d states, inter alia:
"No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

IX except that it bars racial discrimination. But our reading of the cases does not indicate that Title VI provides a private right of action for each individual discriminatee. Those cases involved an attempt by a large number of plaintiffs to enforce a national constitutional right. See *Lau* v. *Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974); *Bossier Parish School Board* v. *Lemon*, 370 F.2d 847 (5th Cir. 1967). Justice Blackmun in his opinion in *Lau* warned against an overly broad reading of the case, stating:

> "I stress the fact that the children with whom we are concerned here number about 1,800. This is a very substantial group that is being deprived of any meaningful schooling because the children cannot understand the language of the classroom . . .
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> [If] we . . . [were] concerned with just a single child . . . I would not regard today's decision . . . as conclusive." 414 U.S. at 571-72.

The limitations of *Lau* were adopted by the Tenth Circuit in *Serna* v. *Portales Municipal Schools*, 499 F.2d 1147, 1154 (10th Cir. 1974), when the Court noted:

> "As Mr. Justice Blackmun pointed out in his concurring opinion in *Lau*, numbers are at the heart of this case and only when a substantial group is being deprived of a meaningful education will a Title VI violation exist."

It appears that *Lau* and *Bossier* were desegregation cases involving attempts to deprive large groups of minorities of their right to equal educational opportunities. But they simply do not give any real support to plaintiff's argument that we must infer an individual right of action under Title IX in favor of a person who has a grievance based upon sexual discrimination against a private educational institution receiving government funds.

Admittedly the courts have implied private causes of action under statutes which were silent as to the existence of a judicial remedy.[11] However, in this instance, construing Title IX to provide a private cause of action before the administrative remedy has been exhausted would be to violate the intent of Congress.

[11] The courts have frequently allowed private rights of action under statutes which did not specifically provide for such an action. Usually, in this situation the court is called upon to utilize its power of statutory

In enacting Title IX Congress established a scheme through which its prohibition against sex discrimination would be enforced by HEW, the administrative agency empowered to extend the federal aid. The statute encourages voluntary compliance in the first instance, an opportunity for an administrative hearing on the issue of discrimination if necessary, and the withdrawal of federal funds as a last resort for a recalcitrant institution which has been found to discriminate in violation of the Act.[12] After department or agency action there is a right to judicial review.[13]

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[11] (Continued)
construction in conjunction with certain policy reasons for allowing a new independent cause of action. See, *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964); *Orsodo* v. *Wyman*, 397 U.S. 397 (1970); *Allen* v. *Board of Elections*, 393 U.S. 544 (1969); *Wyandotte Transp. Co.* v. *United States*, 389 U.S. 191 (1967). This concept has became known as the "doctrine of implication". As stated in 77 Harv.L.Rev. 285, 286, "Implying Civil Remedies from Federal Regulatory Statutes":

> "Some commentators find two separate theories in the doctrine of implication. One author speaks of the 'pre-existing duty' and 'statutory tort' theories. The pre-existing duty theory assumes that the statute is not creating a new cause of action, but is merely defining the standard of conduct required within the context of a duty already owed to the plaintiff. This analysis is most frequently used in tort cases where plaintiff's claim rests upon negligence codified by statutes such as the Federal railroad safety standards. The statutory tort theory . . .is derived from section 286 of the *Restatement of Torts* and allows creation of a new cause of action based on the statutory declaration that certain behavior, although perhaps previously legal, is now wrongful."

[12] 20 U.S.C. 1628 states, inter alia:

> "Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, . . . is authorized to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders. . . . Compliance . . . may be effectuated (1) by termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing of a failure to comply with such requirement. . . . Provided, however, that no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. . . ."

[13] (See preceding page) 20 U.S.C. §1683 states:

> "Any department or agency action taken pursuant to section 1682 of this title shall be subject to such judicial review as may

It is clear that no individual right of action can be inferred from Title IX in the face of the carefully constructed scheme of administrative enforcement contained in the Act. As the United States Supreme Court stated in *National Railroad Passenger Corp.* [*Amtrak*] v. *National Ass'n. of Railroad Passengers,* 414 U.S. 453, 458 (1974), while refusing to infer a private cause of action from the Rail Passenger Service Act of 1970:

> "A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' *Botany Worsted Mills* v. *United States,* 278 U.S. 282, 289, 49 S.Ct. 129, 132, 73 L.Ed. 379 (1929)."

In *Securities Investor Protection Corp.* v. *Barbour,* 412 U.S. 412 (1975), the Supreme Court held that the Securities Investor Protection Act of 1970, which established a nonprofit corporation, SIPC, to provide financial relief to customers of failing broker-dealers, did not create a private right of action for such customers to compel SIPC to exercise its statutory authority for their benefit. Following *Amtrak,* the Court stated as follows:

> "The respondent contends that since the SIPA does not in terms preclude a private cause of action at the instance of a member broker's customers, and since such customers are the intended beneficiaries of the Act, the Court should imply a right of action by which customers can compel the SIPC to discharge its obligations to them. As we said only last Term in analyzing a similar contention: 'It goes without saying . . . that the inference of such a private cause of action not otherwise authorized by the statute must be consistent with the evident legislative intent and, of course, with the effectuation of the purposes intended to be served by the Act.' *Passenger Corp* v. *Passenger Ass'n.,* 414 U.S. 453, 457-458 (1974)."

[13] (Continued)
otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 1682 of this Title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of section 701 of that Title."

In *Cort* v. *Ash,* 422 U.S. 66 (1975) the Supreme Court held that a private right of action could not be implied by a shareholder under 18 U.S.C. §1610, which prohibits corporations from making contributions or expenditures in connection with certain federal elections. The Court based its decision in part on the absence of any evidence that Congress had intended a private right of action for violations of the statute (422 U.S. at 82-83).

The teaching of *Amtrak, SIPC* and *Cort, supra,* is that a private cause of action should not be lightly implied under a statute where Congress has not specifically provided one — especially where Congress has provided for other means of enforcement.[14]

The Congressional history of Title IV leaves no doubt that our legislators were quite concerned about women being placed in an unequal position in seeking admission to institutions of higher learning. U.S. Code Cong. and Admin. News 2462-2679, at 2512. But the Congressional reports indicate that many of the legislators believed that attempts at ending sexual discrimination were better achieved on a voluntary basis rather than by additional governmental regulation. Apparently none of the Congressmen envisioned the rather drastic remedy of individual lawsuits.[15] None of the reports mention the fact that a private cause of action might be implied under Title IX.

[14] In *Goldman* v. *First Federal Savings and Loan,* 518 F.2d 1247, 1250 n. 6 (7th Cir. 1975) this Court commented, but did not decide, that a private cause of action may not be permissible where Congress had provided for other means of enforcement.

[15] See 1972 U.S. Code Cong. and Admin. News 2590 for the additional views of Congressmen Quie and Erlenborn that perhaps sexual discrimination could best be ended without the intrusion of a maze of government regulations. These comments are additionally persuasive since, if the Congressmen believed that Title IX provided for an independent cause of action in addition to the administrative regulations, they surely would have commented when stating in writing their various objections to Title IX.

From a policy viewpoint we see little to be gained by involving the judiciary in every individual act of discrimination based upon sex. Perhaps our resources would be better spent in litigation challenging wholesale sexual discrimination against a large number of men or women by a particular educational institution.[16] Title VI has been effectively employed in this fashion and we see no reason why Title IX would not provide a similar jurisdictional base for those cases where the administrative abilities of HEW would be inundated or inadequate. However, for the day-to-day problems, stemming from the long overdue social revolution in equality of the sexes, we think the HEW administrative procedure is best.[17] Although some commentators[18] have taken the view that working through

[16] We note, but do not decide, that a suit brought by a large group to enforce the national interest against sexual discrimination may be possible under Title IX. Certainly it was permitted by the Supreme Court under Title VI in *Lau* v. *Nichols*, *supra*.

[17] Another objection to the implication of a private remedy arises where Congress has delegated authority to an administrative agency to enforce the statute. Under the doctrine of primary jurisdiction a court has no jurisdiction to accept a case until the issues, requiring resolution of questions within the agency's area of expertise, have been reviewed by the agency with the special competence to deal with the problem. In this case we believe that the HEW is in a much better position to evaluate the statistics of the applicant and entering classes at the various medical schools. In addition HEW has the benefit of comparing the local practice to the admission policies on a national level.

[18] See 1974 Calif.L.Rev. Vol. 62:1124 at 1153; 1974 Texas L.Rev. Vol. 53:103 at 120; 1975 Temple L.Rev. Vol. 49:201 at 221-2. As stated in the Temple article, *supra*:

> "A review of HEW's prior enforcement efforts utilizing procedures identical or similar to the rules under which Title IX will be enforced reveals glaring defects. The use of administrative proceedings as a method of enforcing regulations under HEW's authority can best be characterized by delay caused by protracted negotiations and failure to initiate enforcement proceedings within a reasonable time after noncompliance is found. Even where a voluntary compliance program is negotiated, HEW's failure to periodically follow up on implementation has resulted in the same areas of noncompliance being cited in subsequent reviews."

We only hasten to add that allowing individual litigation under Title IX is no solution. Individual suits invariably lead to delay, compromise, and inconsistent results. In the area of racial discrimination HEW efforts were similarly slow and ineffective in the early sixties. However, in the late sixties HEW vigorously utilized its enforcement procedures in integrating Southern schools. Perhaps the same battle will eventually be waged against sex discrimination through the use of Title IX.

HEW is painstakingly slow and ineffective,[19] we fail to see how a private lawsuit by individual parties would facilitate an end to sex discrimination. To allow a private right of action would be engaging in judicial legislation. Considering our already overburdened system we fail to see why we should stretch a statute by judicial interpretation to the point where it would allow additional litigation which we may not be able to properly accomodate.

III. THE AGE DISCRIMINATION IN EMPLOYMENT ACT IS NOT APPLICABLE TO THIS CASE.

Plaintiff also seeks to claim jurisdiction for this suit under the Age Discrimination Employment Act of 1967, 29 U.S.C. §621 *et seq.*[20] Her amended complaint contends that the denial of admission to medical school has the effect of barring her from securing employment as a doctor of medicine. In addition to sexual discrimination she claims that she was denied admission because of her age.[21]

Plaintiff argues that each defendant medical school functions as an employment agency in regularly undertaking to procure doctors as employees for their university hospitals.

The term employment agency, as defined in 29 U.S.C. §630(c)[22] means any person regularly undertaking with or

[19] Plaintiff has also argued that the federal courts have jurisdiction under Title IX to review a sex discrimination claim when HEW has failed to take sufficient action on the administrative complaint. We need not decide that question in this case since the record indicates that HEW is actively investigating plaintiff's charges of sex discrimination by the medical schools. In this instance it would be improvident for us to find jurisdiction under Title IX as urged by plaintiff on the basis of naming HEW as a defendant and alleging agency inaction.

[20] 29 U.S.C. §621, *et seq.*, at 623(b) states, inter alia:

> "It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age."

[21] The complaint alleges that the Information Booklet for all United States medical schools published by the Association of American Medical Colleges includes in a summary description of the admissions criteria for the Pritzker School of Medicine the statement that: "Applicants over 30 without advance degrees . . . are not encouraged to apply." Of course for the purpose of this appeal we assume that the allegation is true.

[22] 29 U.S.C. §630(c) states, inter alia:

> "The term 'employment agency' means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such person, but shall not include an agency of the United States."

without compensation to procure employees for employers and includes an agent of such person. Litigation concerning the meaning of the term employment agency is rather sparse and primarily has been confined to cases arising under a very similar definition of the term under Title VII, 42 U.S.C. §2000e(e),[23] but generally it has been held to include "only those engaged to a significant degree in that kind of activity as their profession or business." *Brush* v. *San Francisco Newspaper Printing Co.*, 315 F.Supp. 577, 580 (N.D. Cal. 1970), aff'd. 469 F.2d 89 (9th Cir. 1972), *cert. denied* 410 U.S. 943. See also *Greenfield* v. *Field Enterprises*, 4 Fair Employment Practice Cases 548 (N.D. Ill. 1972).

In *Greenfield*, a Title VII case, the court stated that "the act clearly defines the activities of an employment agency in the traditional and generally accepted sense of that term . . . Nothing in the statute or legislative history suggest a broader or different meaning," (at 550). However, in a recent decision, *Kaplowitz* v. *University of Chicago*, 387 F.Supp. 42 (N.D. Ill. 1974) the district court acknowledged that a liberal construction of the term employment agency was required to best effectuate the purposes of Title VII, and found that the University of Chicago Law School was significantly involved in operating allegedly discriminatory placement facilities, stressing the importance to the school of finding employment for its graduates.[24]

Taking plaintiff's allegations as true and further assuming for purposes of argument a liberal construction of the term employment agency holding that the defendants do operate employment agencies, we nevertheless agree with the district court that the complaint fails to allege age discrimination in connection with employment.

Plaintiff is seeking admission to the defendant schools as a medical student, not as an individual seeking em-

[23] 42 U.S.C. §2000e(e) states, inter alia:
"Any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes agents of such a person."

[24] The Court in *Kaplowitz, supra*, did not need to make an express finding that the law school acted as an employment agency in order to decide the case. Thus the language relied upon by plaintiff is dicta.

ployment through the schools. Plaintiff admits that the defendants have not failed or refused to refer her for employment on the basis of her age. The purpose of the act is to provide employment opportunities and hiring for persons between the ages of 40 and 65 without discrimination based on age. This purpose was based upon the finding that older workers found themselves disadvantaged in their efforts to retain or regain employment after being dismissed from their jobs. Nothing in the statute nor the legislative history suggests a broader interpretation. In order for an individual to state a claim under the act, that individual must be qualified to accept employment and only then have been discriminated on the basis of age. Plaintiff's claim is too remote — she has not successfully completed the necessary prerequisites to be in a position to fall within the protection of the Act. Her complaint merely amounts to an allegation of discrimination in admission to a university and fails to state anything beyond a remote connection to discrimination in employment. As such, she fails to state a claim under the 1967 Age Discrimination in Employment Act.

We also note that procedurally plaintiff has failed to comply with the Age Discrimination in Employment Act. The Act authorizes a civil action only after giving notice to the Secretary of Labor sixty days before the suit is filed under 29 U.S.C. 626(d).[25] The purpose of this requirement is to allow the Secretary an opportunity "to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion." There is no indication in the record that plaintiff has complied with this jurisdictional prerequisite. Therefore, even if we accepted plaintiff's argument that a valid cause of action

[25] 29 U.S.C. 626(d) states, inter alia:
"No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of any intent to file such an action. Such notice shall be filed —
(1) within one hundred and eighty days after the alleged unlawful practice occurred, or . . .
• • • • • • • • •
Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal means of conciliation, conference, and persuasion."

existed under the Act we would still have to dismiss for want to jurisdiction.

IV. JURISDICTION DOES NOT EXIST UNDER THE PUBLIC HEALTH SERVICES ACT NOR THE ADMINISTRATIVE PROCEDURE ACT.

Section 799A of the Public Health Services Act[26] provides that the Secretary of HEW may not give financial assistance to schools which discriminate on the basis of sex. Plaintiff claims that this statute gives her the right to maintain a private right of action against the medical schools as a third party beneficiary under the Act. Although Section 799A does not provide for a private cause of action there have been some situations in which the courts have allowed a suit to go forward under an implied right theory.[27]

In this case we believe that to imply jurisdiction under the Act for a private lawsuit would be improvident. This is a suit by a single plaintiff against two predominantly private institutions. In fact, should a court grant her requested relief it would require discriminating against the 2,000 other applicants who had better qualifications than plaintiff.

Finally, plaintiff claims that jurisdiction exists under §706 of the Administrative Procedure Act which authorizes a court to "compel agency action unlawfully withheld or unreasonably delayed." We cannot sustain this suit on this jurisdictional basis since HEW is actively investigating plaintiff's complaint and the delay involved of about one year has not been unreasonable.

---

[26] Section 799A of the Public Health Services Act, 42 U.S.C. 295h-9 states, inter alia:

> "The Secretary may not make a grant . . . for the benefit of any school of medicine . . . unless the application for the grant . . . contains assurances satisfactory to the Secretary that the school or training center will not discriminate on the basis of sex in the admission of individuals to its training programs. . . ."

[27] See *Euresti* v. *Stenner*, 458 F.2d 1115 (10th Cir. 1972); *Organized Migrants in Community Action, Inc.* v. *James Arthur Smith Hospital*, 325 F.Supp. 268 (S.D. Fla. 1971); *Cook* v. *Ochsner Foundation Hospital*, 319 F.Supp. 603 (E.D. La. 1970); *Porrier* v. *St. James Parish Police Jury*, 372 F.Supp. 1021 (E.D. La. 1974).

Accordingly, the decision of the district court in dismissing the complaint is hereby affirmed.

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 4159—The Scheffer Press, Inc., Chicago, Illinois—8-27-76—250

In the

United States Court of Appeals

For the Seventh Circuit

No. 76-1238

GERALDINE G. CANNON,

Plaintiff-Appellant,

v.

THE UNIVERSITY OF CHICAGO, et al.,

Defendants-Appellees.

No. 76-1239

GERALDINE G. CANNON,

Plaintiff-Appellant,

v.

NORTHWESTERN UNIVERSITY, et al.,

Defendants-Appellees.

On Rehearing

DECIDED AUGUST 9, 1977

Before SPRECHER, BAUER, *Circuit Judges*, and GRANT, *Senior District Judge.**

* The Hon. Robert A. Grant, United States District Court for the Northern District of Indiana, is sitting by designation.

BAUER, *Circuit Judge.* After issuing our opinion in this case, we granted plaintiff's petition for rehearing of the issue of whether a private right of action lies under Title IX of Public Law 92-318 in the circumstances of this case.[1] We took this step principally to give the parties an opportunity to develop the question of whether the inclusion of Title IX within the provisions of the Civil Rights Attorney's Fees Award Act of 1976, Pub. L. No. 94-559, § 2, 90 Stat. 2641, requires a different resolution of the Title IX issue presented to us. Also, we were concerned that we had misconstrued the import of *Lau v. Nichols*, 414 U.S. 453 (1974), in resolving the Title IX issue against the plaintiff.

After considering the new briefs submitted by the parties, we remain convinced that no private cause of action lies under Title IX in the circumstances of this case. Accordingly, we adhere to our previous judgment affirming the district court's dismissal of plaintiff's complaint for the reasons noted below.

I.

Shortly after the decision in the case at bar, Congress enacted the Civil Rights Attorney's Fees Award Act of 1976, Pub. L. No. 94-559, § 2, 90 Stat. 2641 (codified at 42 U.S.C.A. § 1988 (1977 Supp.)) The statute provides in relevant part:

> "In any action or proceeding to enforce a provision of . . . title IX of Public Law 92-318, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

On rehearing, plaintiff concedes that the legislative history of the Act makes clear that the Act was not designed to create any remedies for violations of federal civil rights not already authorized under the statutes covered by the Act. E.g., Sen. Rep. No. 94-1011, 94th

[1] We denied plaintiff's petition for rehearing of the other issues raised and decided in our opinion, and the Court internally stayed action on plaintiff's suggestion for rehearing en banc of the entire case pending our decision on rehearing.

Cong., 2d Sess. 6 (1976), *reprinted in* [1976] U.S. Code Cong. & Ad. News 5913; 122 Cong. Rec. S 16525 (daily ed. Sept. 21, 1976) (remarks of Sen. Kennedy); 122 Cong. Rec. H. 12153 (daily ed. Oct. 1, 1976) (remarks of Rep. Drinan). However, plaintiff argues that the Act's inclusion of Title IX constitutes a "most emphatic and unmistakable declaration" of Congress's understanding and intent that private suits by individuals are permitted under Title IX, for the inclusion of Title IX in the Act makes no sense unless Congress believed that private rights of action were already authorized under Title IX itself. In support of her argument, plaintiff refers us to the remarks of various members of Congress made during debates on the Attorney's Fees Award Act,[2] which suggest that at least those members of Congress assumed that private suits were permitted under all of the statutes included in the Act, including Title IX. Plaintiff would have us view those remarks as a subsequent expression of Congress's previous intent in enacting Title IX. This subsequent declaration of Congress's preexisting intent, says plaintiff, must be given at least "great" if not "conclusive" weight in determining whether we should imply a private right of action under Title IX.[3]

Defendants answer that the Act's inclusion of Title IX could be construed as simply indicating an intent to provide for the award of attorney's fees to the prevailing party in any proceeding for judicial review of agency action already expressly provided in Title IX under 20

[2] 122 Cong. Rec. S 17052 (daily ed. Sept. 29, 1976) (remarks of Sen. Abourezk); 122 Cong. Rec. S 17051 (daily ed. Sept. 29, 1976) (remarks of Sen. Tunney); 122 Cong. Rec. S 16431 (daily ed. Sept. 22, 1976) (remarks of Sen. Hathaway); 122 Cong. Rec. S 16262 (daily ed. Sept. 22, 1976) (remarks of Sen. Allen); 122 Cong. Rec. S 16252 (daily ed. Sept. 21, 1976) (remarks of Sen. Scott); 122 Cong. Rec. H 12165 (daily ed. Oct. 1, 1976) (remarks of Rep. Sieberling); 122 Cong. Rec. H 12159 (daily ed. Oct. 1, 1976) (remarks of Rep. Drinan).

[3] *Glidden Co. v. Zdanok*, 370 U.S. 530, 541-42 (1961); *Federal Housing Administration v. The Darlington, Inc.*, 358 U.S. 84, 90 (1958); *Sioux Tribe v. United States*, 316 U.S. 317, 329-30 (1942); *Newyork Philadelphia & Norfolk R.R. v. Peninsula Produce Exchange*, 240 U.S. 34, 39 (1915); *Cope v. Cope*, 137 U.S. 682, 688 (1891).

U.S.C. § 1983. Thus, Title IX's inclusion in the Attorney's Fees Award Act would make sense, say defendants, even if we implied no judicial cause of action on behalf of private parties. Moreover, the defendants argue, even if the Act was intended to authorize the award of attorney's fees to the prevailing party in private party litigation brought to enforce the provisions of Title IX, we should not therefore assume that Conress necessarily was expressing either an understanding that a private right of action already existed under Title IX or an intent to encourage courts to imply one; rather, Congress simply could have been providing for the contingency that future court decisions might imply a private right of action from the provisions of Title IX.

As we read the legislative history of the Attorney's Fees Award Act, it provides no support for plaintiff's argument that the inclusion of Title IX within the Act was intended to provide a private right of action under Title IX. At best, the remarks to which plaintiff has referred us suggest only that some members of Congress may have assumed that private suits were authorized under all of the statutes included within the Act. But, even if the entire Congress shared the assumption that a private right of action was authorized by Title IX, none of the precedents on which plaintiff relies would be controlling, for they involved subsequent legislative history explicitly declarative of Congress's own intent in passing a given statute, rather than a mere assumption concerning a judicial construction that had been or might be placed on a statute after its enactment.

Notwithstanding plaintiff's strained efforts to rewrite the legislative history of Title IX, we find nothing in the legislative history of the Attorney's Fees Award Act that gives us cause to reconsider our holding that no private right of action exists under Title IX. As defendants argue, the legislative history indicates that Congress included Title IX within the Act only to provide for the possibility that the statute might be construed in the future as authorizing judicial implication of a private right of action. This seems clear from a colloquy among Representatives Quie, Anderson, Drinan, Bauman and Railsback, in which Representatives Quie and Bauman

expressed concern that the Attorney's Fees Award Act might be construed as impliedly authorizing private individuals to bring suit under Title IX. 122 Cong. Rec. H. 12152-53 (daily ed. Oct. 1, 1976). Representatives Anderson, Drinan and Railsback, all supporters of the bill, denied that it would effect any change in pre-existing law concerning an individual's right to sue under Title IX. Representative Railsback made their position clear:

> "I would simply like to point out that, as I understand it, it is clearly not the intent of Congress to create a new remedy, but that, rather, this bill would create a remedy only in the event that the courts should in the future determine that an individual may sue under the statutes.
>
> And the bill does not authorize or statutorily grant any private right of action which does not now exist. At least I feel certain that is our intent. I think we ought to establish that in the Record." 122 Cong. Rec. H. 12152 (daily ed. Oct. 1, 1976).

Representative Drinan, the House sponsor of the Senate bill under consideration, "concur[red] completely" in Representative Railsback's comments: "We do not create any new statutory right of action in the bill today." 122 Cong. Rec. H. 12153 (daily ed. Oct. 1, 1976). Any ambiguity inherent in the above record was disspelled by Representative Railsback's subsequent remarks that went unchallenged during final debate on passage of the bill:

> "Mr. RAILSBACK. Mr. Speaker, I rise in support of S. 2278 which is designed to allow the court, in its discretion, to award reasonable attorney fees to prevailing parties—other than the United States—in suits to enforce the Civil Rights Acts which Congress has enacted since 1866.
>
> * * * * * * * * *
>
> Mr. Speaker, In considering S. 2278 for passage today, I have been alerted to several legal issues which were not raised at hearings held by the Senate and House committees. Not wishing to

> establish any legal precedents by implication, I would like to make several points explicitly clear with respect to the intent of this bill
>
> I have been informed by the Committee on Education and Labor as well as several education associations that under title VI of the Civil Rights Act and title IX of the Education Amendments of 1972 there exists a serious question as to whether an individual complainant or class of complainants has the right to sue as a private plaintiff. To date the Department of Health, Education and Welfare has been the prime enforcer of these titles and in the case of Cannon against University of Chicago, the Seventh Circuit U.S. Court of Appeals stated that Congress gave the right of action to HEW and not to private individuals.
>
> It has been brought to my attention that by granting attorneys' fees to prevailing parties other than the United States, Congress might implicitly authorize a private right of action under title VI and title IX. This is not the intent of Congress. This bill merely creates a remedy in the event the courts determine that an individual may sue under these statutes. This bill does not authorize or statutorily grant any private right of action which does not now exist." 122 Cong. Rec. H 12161 (daily ed. Oct. 1, 1976).

We doubt that the legislative history could be much clearer. Congress certainly was not engaged in any effort to rewrite the legislative history of Title IX or to declare its pre-existing intent to create a private right of action thereunder when it included Title IX within the provisions of the Attorney's Fees Award Act. As is clear from Representative Railsback's reference to our holding in the case at bar, Congress did not intend to imply any opinion on the merits of the question before us here. The Act's inclusion of Title IX was intended merely to provide for the possibility that some court might deem it appropriate in the future to imply a private right of action from the provisions of Title IX. It was not intended to do more.

II.

Although our principal motivation in granting rehearing was to obtain the parties' views on the potential impact of the Attorney's Fees Award Act of 1976 on our resolution of the Title IX issue, we were also curious as to why the Department of Health, Education and Welfare, which had consistently supported its codefendants' position that no private cause of action lies under Title IX, did an about face on the merits of that issue in its answer to plaintiff's petition for rehearing. Unfortunately, neither the Department's answer nor its subsequent brief on rehearing explains why the Department no longer believes that "Title IX's administrative procedural remedies were meant to suffice in enforcing Title IX's prohibitions against sex discrimination." Supplemental Brief of the Department of Health, Education and Welfare, Office of Civil Rights at 8. Whatever the reason for the Department's change of heart, it has now adopted the position that implication of a private cause of action under Title IX is justified under the criteria set out in *Court v. Ash*, 422 U.S. 66 (1975):

> "In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,'—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" *Id.* at 78 (emphasis in original) (citations omitted.)

In view of the plaintiff's new arguments regarding Congress's implicit legislative intent in enacting Title IX and the Department's lengthy arguments from *Court*, we will briefly restate our reasoning in terms thereof.

Assuming *arguendo* that plaintiff is a member of the class for whose benefit Title IX was enacted, and that a Title IX action would not displace remedies traditionally available at state law, we remain of the view that implication of a private judicial remedy would be inconsistent with the legislative intent and underlying purposes of the statutory scheme.

We are unpersuaded by the Department's argument that implication of a private right of action must be deemed consistent with the legislative purposes of Title IX simply because private party suits would provide a useful means of enforcing the statutory policy of prohibiting discrimination on the basis of sex in federally funded educational programs. Such an argument goes too far, for implication of a private right to enforce every federal statute would have the same effect of assisting agency efforts to obtain compliance with federal policies. Simply put, the argument begs the question of whether implication of a private judicial remedy is consistent with the purposes of a legislative scheme that gives responsibility for enforcing its statutory policies to an administrative agency rather than to "private attorneys general." We think it clear from the face of the statute and the regulations promulgated pursuant thereto that, in providing private parties with an administrative but not a judicial forum in which to raise complaints of sex discrimination,[4] it

[4] Section 901(a) of Title IX prohibits discrimination on the basis of sex in federally funded educational programs. 20 U.S.C. § 1681(a). Section 902 provides for administrative enforcement of the statutory prohibition by *directing* each federal agency providing financial assistance "to effectuate the provisions of Section 1681 . . . by issuing rules, regulations or orders of general applicability which shall be consistent with the objectives of the statute . . . ." 20 U.S.C. §1682. Pursuant to the directive given above, the Department of Health, Education and Welfare has established interim regulations permitting private parties to file complaints of sex discrimination and providing for a prompt and thorough investigation of any such complaints. 45 C.F.R. § 86.71, *adopting by reference* 45 C.F.R. § 80.7(b). The Department's regulations provide that compliance shall be secured by informal means, if possible, and otherwise by "any other means authorized by law." 45 C.F.R. § 86.71, *adopting by reference* 45 C.F.R. § 80.8(a). However,

(Footnote continued on following page)

was Congress's purpose to commit the screening of Title IX complaints to the administrative agencies charged with the responsibility of overseeing federally funded educational programs and to encourage resolution of those complaints by means of agency conciliation efforts directed at achieving voluntary compliance with the statutory prohibition. Those purposes would not be served by implying a statutory cause of action that would permit private parties to circumvent the remedial scheme created by Congress. See, e.g., *Johnson v. Railway Express Agency*, 421 U.S. 454, 461 (1975).

Nor are we convinced that there is anything in the legislative history of Title IX indicative of an explicit or implicit intent to create or allow a private right of action. We are told that because federal court decisions implying a private right of action under Title VI of the Civil Rights Act of 1964 existed at the time Title IX was adopted,[5] we may infer that Congress intended that a

[4] *continued*

"(d) No action to effect compliance by any other means authorized by law shall be taken until (1) the responsible Department official has determined that compliance cannot be secured by voluntary means, (2) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance, and (3) the expiration of at least 10 days from the mailing of such notice to the recipient or other person. During this period of at least 10 days, additional efforts shall be made to persuade the recipient or other person to comply with the regulation and to take such corrective action as may be appropriate." 45 C.F.R. § 86.71, *adopting by reference* 45 C.F.R. § 80.8(d).

[5] Plaintiff calls to our attention a number of such cases. *Alvarado v. El Paso Indep. School Dist.*, 445 F.2d 1011 (5th Cir. 1971); *Kelley v. Altheimer Public School Dist.*, 378 F.2d 485 (8th Cir. 1967); *Cypress v. Newport News General and Nonsectarian Hospital Ass'n.*, 375 F.2d 648 (4th Cir. 1967); *Bossier Parish School Bd. v. Lemon*, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967).

The Department of Health, Education and Welfare also refers us to a number of district court cases and the Sixth Circuit's decision in *Nashville I-40 Steering Comm. v. Ellington*, 387 F.2d 179 (6th Cir. 1967), *cert. denied*, 390 U.S. 921 (1968).

private judicial remedy be made available under Title IX in view of Congress's explicit intent to pattern the remedial provisions of Title IX after those of Title VI. First of all, we do not read those decisions as affirmatively establishing the existence of an implied private right of action under Title VI at the time Title IX was enacted.[6] More important, there is nothing in the legislative history of Title IX itself indicating that Congress was even aware of those decisions, let alone intended to adopt their construction of Title VI.

[6] Most of the cases cited in note 5 *supra* were in fact explicitly brought under the authority of 42 U.S.C. § 1983 to redress violations of rights granted by Title VI, and not under the implied auspices of Title VI itself. In view of the fact that the cases were brought under Section 1983, statements made therein that private parties had stated a claim under Title VI must be read as simply a shorthand way of saying that a cause of action under Section 1983 had been made out by virtue of the sufficiency of the allegations that Title VI had been violated.

We suspect that even the cases that do not expressly mention Section 1983 were in fact brought under that statute, for all the cases cited to us appear to have been brought against public agencies acting under color of state law. Although the Fifth Circuit's broad dictum in *Bossier* lends some support to plaintiff's assertion that it recognized an implied right of action under Title VI, we note that the suit was brought to desegregate a public school system, and the court's actual holding was merely that "these plaintiffs have *standing* to assert their right to equal educational opportunities with white children." 370 F.2d at 852 (emphasis added). As we read the case, *Bossier* relies on Title VI's prohibition of racial discrimination in federally funded educational programs merely to give plaintiffs the requisite *standing* to sue "to enforce a national *constitutional* right." *Id.* at 851 (emphasis added). As the suit was brought to enforce "the constitutional right of Negro school children to equal educational opportunities with white children," *id.* at 849, we doubt that the court meant to hold that private parties have an implied cause of action under Title VI alone. Moreover, it seems logical to assume that the suit was brought under the authority of Section 1983, for, as far as we know, no precedent existed at the time *Bossier* was decided for the proposition that anyone could bring a suit directly under the Fourteenth Amendment to enforce rights guaranteed by the equal protection clause without some independent statutory authorization such as Section 1983.

Given the lack of any explicit or implicit intent to create a private judicial remedy in the legislative history of Title IX itself, we remain of the view that Congress's express provision of a sophisticated scheme of administrative enforcement should be construed as an indication of an implicit legislative intent to exclude any private judicial remedies for violations of Title IX other than the judicial review mechanism Congress made available to private parties in the statute. See *National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers*, 414 U.S. 453, 458-61 (1974); *Goldman v. First Federal Savings and Loan Ass'n*, 518 F.2d 1247, 1250 n.6 (7th Cir. 1975).

We recognize, of course, that *Court v. Ash*, *supra* at 82, states that it is not necessary for the legislative history of a statute to show an explicit intent to create a private right of action for us to imply one for violations of a federally created right. It does not follow, however, that we *must* imply a private right of action simply because the legislative history shows no explicit intent to deny one. Were we confronted with an alleged violation of a fundamental federal constitutional or statutory right for which Congress has provided no remedy at all, or for which the remedies available have proven to be wholly inadequate to the task of protecting those rights, we might take a different view of the matter. E.g., *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 390-97 (1971); *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 206-07 (1944); *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277, 1285-87 (7th Cir. 1977). Under the circumstances of this case, however, we believe it would be an unwarranted exercise of federal judicial power to imply a private right of action in the face of a sophisticated scheme of administrative enforcement and judicial review that, if given an opportunity to work, may well prove itself adequate to the task for which Congress designed it. Simply put, notwithstanding the Department's change of heart, we remain unpersuaded that it is a "necessity" to imply a private right of action under Title IX to effectuate the purposes of Congress's legislative scheme. *Piper v. Cris-Craft Indus., Inc.*, 97 S. Ct. 926, 941 (1977).

III.

We have on rehearing also reconsidered plaintiff's argument that *Lau v. Nichols*, 414 U.S. 453 (1974), controls the case before us.

Previously we distinguished *Lau* on the ground that it involved a class suit against a public school system rather than an individual suit against the private universities before us here. In so doing, we relied heavily on the Tenth Circuit's reading of Mr. Justice Blackmun's concurring opinion in *Lau*, which prompted that court to conclude that "only when a substantial group is being deprived of a meaningful education will a Title VI violation exist." *Serna v. Portales Municipal Schools*, 499 F.2d 1147, 1154 (10th Cir. 1974); accord, *Otero v. Mesa County Valley School Dist. No. 51*, 408 F. Supp. 162, 170-72 (D. Colo. 1975); see *Pabon v. Levine*, 70 F.R.D. 674, 676-77 (S.D.N.Y. 1976) (Weinfeld, J.).

On rehearing, both the Department and the plaintiff argue that we misconstrued the import of Justice Blackmun's concurring opinion in *Lau*, which states:

> "If we . . . [were] concerned with just a single child, . . . I would not regard today's decision . . . as conclusive on the issue of whether the statute and the guidelines required the funded school district to provide special instruction." 414 U.S. at 571-72.

Justice Blackmun's caveat, we are told, was directed only to the appropriateness of the type of relief ordered in that case rather than to the question of whether a Title VI violation would have been made out if only a single plaintiff was involved.

We are not convinced that our reliance on *Serna*'s reading of *Lau* was misplaced, but, even if we were, we would still adhere to our statement that *Lau* provides no real support for plaintiff in the circumstances of this case. Our conclusion would remain the same because *Lau* was brought under the authority of 42 U.S.C. § 1983, and the question of whether an implied private right of action lay directly under the provisions of Title

VI was never presented to the Supreme Court.[7] Because plaintiffs' cause of action in *Lau* arose under 42 U.S.C. § 1983, *Lau* simply cannot be read as supporting the proposition that private parties have an implied cause of action under Title VI that would mandate implication of a private right of action here under the comparable provisions of Title IX. Accordingly, neither *Lau* nor any other decision relying thereon for the proposition that an implied private right of action lies directly under Title VI is of help to the plaintiff at bar, who is unable to invoke 42 U.S.C. § 1983 because she is suing private universities acting under color of no state law.

We adhere to our previous holding that no private right of action lies under Title IX in the circumstances of this case.

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Clerk of the United States Court of Appeals for the Seventh Circuit

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[7] The jurisdictional statement in the *Lau* plaintiffs' complaint shows that their constitutional and statutory claims were brought under 42 U.S.C. § 1983:

> "Jurisdiction is conferred upon this Court by 28 U.S.C. § 1331 and by 28 U.S.C. § 1343(3)(4), *which provide original jurisdiction in suits authorized by 42 U.S.C. § 1983.*" Plaintiffs' Complaint for Injunctive and Declaratory Relief, *Lau v. Nichols*, 414 U.S. 453 (1974) (emphasis added).

A review of the briefs filed in the Supreme Court reveals that the parties presented no jurisdictional issues to the Court, and at least one of the amicus briefs filed in support of plaintiffs' claims makes explicit that

> "petitioners sought in *this action, brought under 42 U.S.C. § 1983*, to require respondents to provide them assistance in learning English so that they might benefit from school as other children do. They contended that respondents' failure to provide such assistance violates the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 and regulations thereunder." Brief for the National Education Association and the California Teachers Association as Amici Curiae at 5, *Lau v. Nichols*, 414 U.S. 453 (1974) (emphasis added)

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DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
REGION V
300 SOUTH WACKER DRIVE
CHICAGO, ILLINOIS 60606

OFFICE OF
THE REGIONAL DIRECTOR

June 2, 1976

Mr. John Cannon
2420 The Strand
Northbrook, Illinois 60062

Dear Mr. Cannon:

This is to inform you of the present status of the complaints filed by Mrs. Geraldine Cannon against various medical schools in the State of Illinois. We have completed the on-site portion of the investigations into your client's allegations.

However, the issues raised by the complaints are of first impression and national in scope. As a result national Office for Civil Rights policy must be developed. The authority for formulating national policy rests in our Headquarters office. Because of the involvement of that Office and the need for an in-depth study of the issues raised, I am unable to give you an exact date for the release of findings in the cases.

Please be assured that we will move as expeditiously as possible in this matter.

Sincerely,

Charles E. Duffy
Chief
Higher Education Branch
Office for Civil Rights
Region V

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20201

OFFICE OF THE
GENERAL COUNSEL

September 17, 1974

Dr. Bernice Sandler
Executive Associate
Project on the Status and
Education of Women
Association of American Colleges
1818 R Street, N. W.
Washington, D.C. 20009

Dear Dr. Sandler:

Peter Holmes has asked me to respond to your letter to him of July 18, 1974, in which you inquire whether individuals who allege discrimination on the basis of sex have a private right to bring suit against an educational institution pursuant to Title IX of the Education Amendments of 1972. You were particularly concerned as to whether a private suit could be brought against a private institution under Title IX. The private right to bring suit against an educational institution has been held to exist under the analogous provisions of Title VI of the Civil Rights Act of 1964, *Bossier Parish School Board* v. *Lemon*, 370 F.2d 847 (5th Cir. 1967), and we believe that the holding in that case would be followed under Title IX.

The first part of your question concerns the private right of suit under Title IX against educational institutions generally. In *Bossier Parish*, the Fifth Circuit found for private plaintiffs who had brought suit under Title VI against a school district which, they alleged, discriminated on the basis of race.

The Court held that Section 601 of Title VI stated a "reasonable condition that the United States may attach to

any grant or financial assistance and may enforce by refusal or withdrawal of Federal assistance." 370 F.2d at 852. Therefore, once the school district accepted Federal financial assistance, it brought its school system within the class of programs subject to the Section 601 prohibition against discrimination and "[N]egro school children, as beneficiaries of the Act, have standing to assert their Section 601 rights." 370 F.2d at 852.

It should be noted that the case did not address two other issues: first, the question of whether HEW is an indispensable party, and second, whether a complainant would be required to exhaust his/her administrative remedies by filing a complaint with HEW and allowing the Department to attempt to secure voluntary compliance and to initiate enforcement proceedings against the discriminator, if necessary.

The proposed Title IX Regulation, 45 CFR part 86.4(a) requires as a condition of Federal financial assistance, an assurance, satisfactory to the Director, that each program or activity operated by the recipient will comply with Title IX and the Regulation. Part 86.4(b)(3) further states that such assurance shall obligate the recipient for the period during which Federal financial assistance is extended. This requirement is directly analogous to the assurance required of a recipient by Title VI, and would carry with it the same obligations concerning the prohibited discrimination and concerning the rights of beneficiaries under Title VI. Private plaintiffs under Title IX would have the right of suit as beneficiaries of the Act, and would have standing to assert their Section 901 rights.

The second part of your question concerned standing to bring a private suit against a private institution under Title IX. At the outset, let me say that the standing of a private litigant to sue under Title IX does not rest on the public or private nature of the institution involved, although the nature

of the discrimination which may validly be challenged in such a suit does. Title IX deals with three general areas in which sex discrimination is prohibited: admissions, treatment, and employment. Section 901(a) (1) of Title IX specifically exempts private undergraduate institutions from the prohibition of discrimination on the basis of sex in admissions. However, private graduate and professional institutions are subject to the discrimination prohibition in all three areas covered by the Act. A private plaintiff would have standing to bring a Title IX suit against a private undergraduate institution for discrimination on the basis of sex in treatment and employment, and against a private graduate or professional institution for discrimination on the basis of sex in all three areas covered by the Act, but would be barred from bringing such a suit against a private undergraduate institution in the area of admissions because of the statutory exemption.

I hope that these comments will be of assistance to you, and please do not hesitate to let me know if you have further questions.

Sincerely,

Theodore A. Miles
Assistant General Counsel